**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **PAUL D. WALTER** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | |
| **PAYLESS CASHWAYS** | ) | |
| Respondent | ) | Docket No. 262,630 |
| | ) | |
| AND | ) | |
| | ) | |
| **ZURICH INSURANCE CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appealed Administrative Law Judge (ALJ) Steven J. Howard's February 22, 2002 Award. The Appeals Board (Board) heard oral argument on August 21, 2002. Gary M. Peterson of Topeka, Kansas, was appointed Board Member Pro Tem and participated in the determination of this appeal.

### APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for the respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.

## ISSUES

Citing *Hoover* [1] the ALJ concluded that claimant, "at the time of his occupation accident, was performing work which had [been] specifically forbidden. . . . claimants [sic] activities were outside of his employment and no compensation is herein awarded." [2]

Claimant argues the ALJ erred in denying benefits because, although claimant may have been performing work in a prohibited manner, he was not performing prohibited work. Furthermore, claimant's supervisor had directed and, at least impliedly, authorized claimant's pursuit and apprehension of the suspected shoplifter.

Conversely, respondent contends that claimant's conduct in apprehending the suspect violated respondent's written policies and denies that the supervisor directed claimant to apprehend the suspect. As such, claimant's injuries are not compensable under the Workers Compensation Act.

Whether claimant's accident arose out of and in the course of his employment is the only issue for the Board's review.

## FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The Board agrees with the ALJ's findings of fact, but disagrees with his conclusions of law. Specifically, the Board disagrees that at the time of claimant's occupational accident, he was performing work which had been specifically forbidden. To the contrary, claimant's work included apprehending suspected shoplifters. Therefore, to the extent claimant violated the respondent's procedure policies, he was performing his work in a forbidden manner. This does not take claimant's accidental injury outside the Workers Compensation Act. The ALJ's denial of benefits should, therefore, be reversed.

Judge Howard summarized the facts surrounding claimant's accident and injury as follows:

> The facts in this claim, reveal that claimant was employed as an asset protection investigator for the respondent. On November 1, 2000, while in the Kansas City, Kansas State Avenue store, claimant was contacted by his supervior [sic], Kevin Strain, to observe an individual in the store who may have been shoplifting. Claimant testified regarding his observations of the suspect pushing a cart containing a trash can containing work clothes through the side entry of the store into the garden area and sounding an

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[1] *Hoover v. Ehrsam Co.,* 218 Kan. 662, 544 P.2d 1366 (1976).

[2] Award at 5.

> alarm. Claimant further testified that the cart was placed between two pallets in the fence enclosed side area of respondent's property. The suspect then left respondent's property through the front door while being observed by the claimant. Claimant conversed with his supervisor regarding continual surveillance of the suspect. Claimant noticed at the time the suspect vacated the premises, that he was wearing what appeared to be new work boots with a tag attached. The claimant observed the suspect's actions while standing in front of the store. The suspect entered a private vehicle drove the vehicle out of respondent's parking lot went down State Avenue and turned back into a strip mall adjacent to respondent [sic] property. The suspect then entered the Dollar General Store, and claimant continuing his surveillance, walked from the property of respondent to the Dollar General Store approximately 3 or 4 stores away. Claimant observed the suspect filling a trash can with merchandise from Dollar General store and pushing the can contained in the cart through the front doors of the Dollar General store at which time claimant attempted to detained [sic] the suspect in the presence of the claimant's supervisor. The suspect when advised of claimant and his supervisor's positions immediately ran and claimant tackled the suspect injuring his [claimant's] right leg. [3]

The Act is to be liberally construed to bring both employers and employees within its provisions, affording both the Act's protections. The Act is to be applied impartially to both employers and employees. [4]

But before an accidental injury is compensable under the Act, the accident must arise out of and occur in the course of employment.

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. [5]

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[3] Award at 2 and 3.

[4] K.S.A. 44-501(g).

[5] K.S.A. 44-501(a).

The Act does not define "arising out of and in the course of employment" other than to state what shall not be construed as satisfying the definition. [6] This phrase has been further defined by case law.

> If an employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment. [7]
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> . . . .
>
> An exception to the foregoing rule is to be made when the employer has previously accepted the benefit of the forbidden practice with knowledge that the prohibition has been violated. [8]
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> . . . .
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> Another exception to the rule stated in paragraph 2 is to be made when the prohibition is so general in its terms that it is readily outweighed by the specific benefit to the employer of the doing of the prohibited act. [9]

The courts have provided additional guidance and have held that an accident "arises out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Accordingly, an injury arises out of employment if it arises out of the nature, conditions, obligations, or incidents of the employment. [10] Additionally, the phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the employee was at work in the employer's service. [11]

In order to deny benefits for failing to use a safety guard or for performing prohibited activity, Kansas law also requires that such activity be done willfully with a headstrong or stubborn disposition. The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme

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[6] K.S.A. 44-508(f).

[7] *Hoover, supra,* at Syl. ¶ 2.

[8] *Id*. at Syl. ¶ 3.

[9] *Id.* at Syl. ¶ 4.

[10] *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[11] *Id*. at Syl. ¶ 1.

Court in *Bersch* [12] and the Kansas Court of Appeals in *Carter* [13] defined "willful" to necessarily include:

> The element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reasons; obstinate; perverse; stubborn; as, a willful man or horse.' [14]

In the claim at hand, the Board concludes claimant's accident arose out of and in the course of employment with respondent. At the time of the accident, claimant was attempting to apprehend a suspected shoplifter. This was a function of claimant's job. Unlike in *Hoover*, the claimant here was not performing a prohibited task or forbidden work. To the extent claimant failed to adhere to company policies in performing this function goes to the manner of performing his job. In addition, claimant was under the direction and control of his supervisor and apparently believed that no prohibition was being violated or that, under the circumstances present, the benefits to the employer outweighed any general prohibition. Thus, claimant was not acting willfully with a headstrong disposition. To the contrary, claimant was acting in a good faith belief that he was advancing the interests of his employer.

Accordingly, the Board concludes claimant's accident arose out of the nature, conditions, and incidents of employment. Considering the time, place, and circumstances surrounding the accident, the Board concludes that the accident also occurred in the course of claimant's employment.

**WHEREFORE**, the Board reverses the February 22, 2002 Award and concludes that claimant's November 1, 2000 accident arose out of and in the course of his employment with respondent.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Paul D. Walter, and against the respondent, Payless Cashways, and its insurance carrier, Zurich Insurance Company, for an accidental injury which occurred on November 1, 2000, for a 12 percent scheduled injury to the right leg based upon a weekly compensation rate of $401. The claimant is entitled to three (3) weeks of temporary total disability compensation at the rate of $401 per week or $1,203 followed by 23.64 weeks of permanent partial disability compensation at $401 per week or $9,479.64 for a 12 percent permanent partial scheduled

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[12] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[13] *Carter v. Koch Engineering,* 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[14] *Carter*, 12 Kan. App. 2d at 85 (reference and citation omitted).

disability making a total award of $10,682.64, all of which is due and owing to the claimant and ordered paid in one lump sum less amounts previously paid.

Claimant is further entitled to all reasonable and necessary medical expenses and unauthorized medical up to the statutory maximum upon presentation to respondent of proof of such expense. Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

Costs are assessed to the respondent and insurance carrier as set forth in the Award.

**IT IS SO ORDERED.**

Dated this _____day of July 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**Dissent**

I respectfully disagree with the majority opinion. I would affirm the Judge's findings as set forth in the February 22, 2002 Award.

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director